

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION**

**Alex Edward Akin, Trent Dwight Newman, §
and John Michael Quirk, III, individuals, §**

Plaintiffs, §

vs. §

**Boss Reclamation, LLC, and §
Luke Thompson and Rick Evans, §
individuals, §**

Defendants. §

CASE NO. _____

REPRESENTATIVE ACTION

JURY TRIAL DEMANDED

PLAINTIFFS' ORIGINAL COMPLAINT

INTRODUCTION

1. This is a representative action for unpaid wages and overtime brought pursuant to the Fair Labor Standards Act, (FLSA) 29 U.S.C. § 216(b) and for retaliation.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 201, et seq, 28 U.S.C. § 1331 and 1337, diversity jurisdiction and the doctrine of pendant jurisdiction.

PARTIES

3. Plaintiff Akin is a resident of Dalhart, Texas, Plaintiff Newman is a resident of Dalhart, Texas, and Plaintiff Quirk is a resident of Amarillo, Texas, at times material they worked for Boss Reclamation, LLC, out of its facility in Ruidoso, New Mexico, commuting from Dalhart, Texas. Akin and Newman were hired by Boss in Dalhart, Texas. They bring this action on behalf of themselves and as representative of similarly situated workers who file consents to join in this action.

4. Defendant Boss Reclamation, LLC ("Boss"), may be served by serving its registered agent, Luke Thompson at 9801 Hunsley Rd., Canyon, Texas 79015. Boss is engaged in the operation of heavy equipment to remove non-native trees off of rivers and/or services for commerce in the State of Texas, New Mexico and Kansas. Luke Thompson ("LT") is an individual and one of the principal's of Boss, he can be served at by serving him at Luke Thompson, 9801 Hunsley Rd., Canyon, Texas 79015. Rick Evans ("RE") is an individual and may be served by serving him at 220 Crown Dr., Ruidoso, New Mexico, 88355-8330. Boss maintains its principal place of business in Canyon, Texas, and Ruidoso, New Mexico. LT and RE are jointly and severally liable for the acts of Boss because they control the entity and make the day to day decisions about employees payroll matters and rates of pay as it relates to Boss.

FACTS

5. Plaintiffs Akin, Newman and Quirk were employed by the Defendant Boss, in Dalhart, Texas, and commuted to Ruidoso, New Mexico from Dalhart ,Texas, from 2003 until August 2008 for Akin, from September 1, 2006 to July 2008 for Newman, and 2005 to mid 2006 and then mid January of 2008 to September of 2009 for Quirk at which time he was fired for complaining about his improper pay. LT and RE are individuals who control Boss, and who control the day to day operations and makes decisions about payroll matters and rates of pay concerning the employees of Boss.

6. Boss, by and through LT and RE, as well as its officers, agents, employees and representatives combined, conspired and acted through a concert of action to avoid paying overtime to its hourly employees and to retaliate against and punish those employees who complained about such treatment. It is believed the plaintiffs, as well as others, including but not

limited to the other non-exempt hourly workers, in the course of their employment with Boss, and during existence of this continuing conspiracy, participated in the combination, concert of action and conspiracy, whichever, hereinafter alleged and are co-conspirators.

7. During the time of Plaintiffs employment Defendant, Boss failed to pay Plaintiffs and others similarly situated, actual overtime for hours of work they performed in excess of 40 hours per week as required by the Fair Labor Standards Act ("FLSA"). LT and RE regularly tell the employees that Boss does not pay overtime because of an agricultural exemption. It is believed that Boss has recently begun paying overtime because of the inapplicability of any claimed agriculture exemption.

8. The failure to pay plaintiffs and others similarly situated their lawful overtime wages under the Fair Labor Standards Act included paying all overtime hours, and hours worked that was paid as regular time, not time and a half as required by the FLSA.

9. Similarly situated individuals working in the production of goods or services for commerce at the Defendants' facility in Texas, and Ruidoso, New Mexico were deprived of their lawful overtime wages under the Fair Labor Standards Act in the same manner as Plaintiffs. This action is brought on behalf of those similarly situated workers.

10. The Defendants' failure to pay Plaintiffs and similarly situated workers their lawful wages required by the Fair Labor Standards Act was willful. Despite its knowledge that time spent performing their daily activities for the benefit of Boss, particularly those hours spent working over forty (40) hours per week, constituted work and is compensable time the Defendants failed and refused to pay overtime. The Defendants have made no effort to pay plaintiffs and others similarly situated since Boss has begun paying overtime. The foregoing activities performed by the workers are compensable time under the FLSA. Defendants took no

steps to compensate workers at its facility in the State of Texas or the State of New Mexico for this time and, on information and belief, took no steps to compensate workers at its facility for this time in violation of the law.

REPRESENTATIVE ACTION

11. Plaintiffs brings action on behalf of themselves and all similarly situated employees of Boss that are controlled by LT and RE. Plaintiffs request that notice be issued to those employees informing them of their right to file consents to join in this action.

CAUSES OF ACTION

COUNT I FLSA

Alex Edward Akin, Trent Dwight Newman and John Michael Quirk III, for their Count I of this Complaint, inclusive of the foregoing, allege and state:

12. Plaintiffs and similarly situated workers are entitled to relief pursuant to 29 U.S.C. § 216(b) of the Fair Labor Standards Act for damages, reasonable attorneys fees and costs.

COUNT II State of New Mexico Wage and Hour Violations (50-4-21, et seq.)

In addition to the foregoing and as Count II of this Complaint, Plaintiffs reallege herein as though repeated in full each allegation contained in paragraphs 1 through 12, inclusive and, further, Plaintiffs allege and state:

13. This Court has jurisdiction of Count II under Section 215(a)(3) of Title 29 U.S.C. and Section 1332 U.S.C. (28 U.S.C.A., Section 1332) and the principles of pendant jurisdiction. The matter in controversy exceed the sum of \$75,000.00, it is believed, exclusive of interest and cost.

14. These Defendants have likewise violated Section 50-4-21, et seq., of the Statutes of the State of New Mexico, specifically the Minimum Wage Act. The forgoing Statute provides that the minimum wage in the State of New Mexico, effective January, 1, 2008 is \$6.50 per hour with an overtime rate of \$9.75 per hour and as of January 1, 2009, that rate was increased to \$7.50 per hour with an overtime rate of \$11.25 per hour.

15. The employees of Boss regularly work more than forty (40) hours per week and regularly work at least nine (9) hours per day, including one hour to service the equipment, at least five (5) to six (6) days per week. Defendants have failed and refused to pay the proper minimum wage rate, and have failed and refused to pay time and one half for overtime, at least until recently. Defendants owe these plaintiffs and others similarly situated the proper rate of pay, overtime pay, liquidated damages, all costs and reasonable attorneys fees for which plaintiffs herewith sue.

16. Plaintiffs have been damaged as a result, both actual and punitive damages, reasonable attorney fees and cost for which they herein sue.

**CLASS ALLEGATIONS
(50-4-26)**

17. Akin, Newman and Quirk seek to bring this suit as an opt-out class pursuant to 50-4-26 of the New Mexico Statutes on behalf of themselves and other similar situated employees and former employees of Boss. Plaintiffs do not know the exact number of class members but estimate there may be as many as forty (40) members. The actions by defendants in failing to pay overtime will have substantially equal impact on all members of the class and Akin, Newman and Quirk will fairly and adequately protect the interests of the class.

18. The prosecution of separate actions by or against individual members of the class would create a rise of inconsistent or varying adjudications which would establish incompatible standards of conduct for the defendants and adjudications with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications. Further, the Defendants have acted on grounds generally applicable to the class thereby making it appropriate for the Court to enter final relief or declaratory relief as the case may be, with respect to the class as a whole. Further, the action seeks to adjudicate claims as to defendants violation(s) of the Minimum Wage Act of the State of New Mexico, the remedies provided in said act and the enforcement thereof. The members of the class as so named and described will be referred to hereinafter, variously, as the class or class members.

COUNT III
Tort of Retaliation for Complaining About
Overtime and Working Conditions

In addition to the foregoing and as Count III of this Complaint, Plaintiffs reallege herein as though repeated in full each allegation contained in paragraphs 1 through 18, inclusive and, further, Plaintiffs allege and state:

19. This Court has jurisdiction of Count III under section 215(a)(3) of Title 29 U.S.C. and Section 1332 U.S.C. (28 U.S.C.A., Section 1332) and the principles of pendant jurisdiction. The matter in controversy exceed the sum of \$75,000.00, it is believed, exclusive of interest and cost.

20. In 2009 it is believed Boss fired at least of worker for complaining about working conditions and the company's refusal to pay overtime and have retaliated against others for doing the same, specifically Plaintiff Quirk.

21. Boss, at the direction of LT and RE and acting through its management regularly discriminate against employees by placing them in unfavorable positions at work as a means of punishment for complaining about unpaid overtime, and complaining about having to purchase their required equipment from the company, among other working condition complaints. The defendants terminate or treat employees in an outrageous manner to quell complaints about unpaid overtime, working conditions and the requirement that the workers are required to drive to Ruidoso, N.M. on Sunday evening in advance of the work week as a condition of employment. This requirement reduces their effective rate of pay when the company refuses to pay for their travel time. This behavior by the Defendants constitutes outrageous conduct and violates the FLSA and New Mexico statutory law.

FRAUDULENT CONCEALMENT

22. Plaintiffs bring this cause seeking the equitable tolling and/or tolling by estoppel of the statute of limitations beyond three (3) years and seeks recovery back to the time Boss began refusing to pay overtime. Boss regularly tells employees that it does not pay overtime because of a claimed phantom agriculture exemption. This practice is a per se violation of the Fair Labor Standards Act and it is believed Boss recently ceased this practice in recognition of the fact it was violating the law. Plaintiffs are entitled to go beyond the three (3) year statute of limitations as a result of Boss', LT's and RE's fraudulent concealment of same and the company policy of labor cost reduction by refusing to pay time and one-half (1/2) for overtime to increase Defendants' profits, all at the expense of the employees under the false guise of a claimed agriculture exemption that does not apply.

PRAYER FOR RELIEF

Wherefore, Plaintiffs prays that this Court:

- a. Issue notice to all similarly situated employees of Boss informing them of their right to file consents to join in this action;
- b. Declare that Plaintiffs and similarly situated workers who file consents to join this suit are entitled to pay for all of their FLSA-defined hours of work, including all hours worked over 40 hours in one week, including driving to the job site in a company vehicle.
- c. Awarding Plaintiffs and similarly situated workers who file consents to join in this suit, their unpaid regular hourly wages for hours of work up to 40 hours per week and their unpaid overtime for all hours of work in excess of 40 hours per week, an equal amount of liquidated damages, attorneys fees and costs of suit and such other relief as this Court deems just and proper.
- d. Award Plaintiffs and similarly situated workers who file consents damages and costs for retaliation and outrageous conduct.
- e. Damages and attorney fees for causes under pendant jurisdiction as pled.
- f. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

LAW OFFICES OF JERRY D. McLAUGHLIN
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Amarillo, Texas 79101
806-371-9110 - Telephone
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- and -

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Philip R. Russ Bar No. 17406000

JURY DEMAND

Plaintiffs herewith demands a trial by jury.

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Alex Edward Akin, Trent Dwight Newman and
John Michael Quirk, III

(b) County of Residence of First Listed Plaintiff Dallam
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Law Offices of Philip R. Russ, 2700 S. Western, Suite 1200,
Amarillo, Texas 79109. 806-358-9293

DEFENDANTS

Boss Reclamation, LLC, and
Luke Thompson and Rick Evans, individuals

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

Failure to Pay Overtime

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12-31-2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____